

"The amount in the bankruptcy notice was not due. There was a mistake in the calculation of interest..... It is said that that is a formal defect which can be set right under section 143, sub-section 1, of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him.....It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of section 143."

In the circumstances, I would say that the bankruptcy notice was defective and should be set aside.

The judgment creditor will pay the costs of this application.

Order accordingly.

LEE HENG & CO. v. C. MELCHERS & CO.

[C. A. (Thomson C.J., Hill and Good J.J.A.)
September 18, 1962]

[K.L. — F.M. Civil Appeal No. 28 of 1962]

Contract — Delivery of goods of a different brand from those ordered — Action for damages for breach of warranty — Measure of damages — Date to be used for assessing market values for measuring damages — Contracts (Malay States) Ordinance, 1950, s.74.

Sale of Goods — Breach of warranty — Damages — Assessment of.

This was an action for breach of warranty of a contract under which the defendants were to supply shovels to the plaintiffs bearing the brand "Spatenmann". The shovels actually supplied were of another brand.

The learned Magistrate holding that there was a breach of warranty assessed damages for the plaintiffs on the basis of the difference between the market value of the goods supplied and the market value of the goods ordered, both values being those as on the date of delivery of the goods. This decision was reversed in the High Court on the finding that the evidence disclosed no breach of warranty. On appeal,

Held: there was a breach of warranty and that the damages were correctly assessed by the learned Magistrate.

Per Thomson C.J.: "There is no corresponding sub-section in section 59 of our Sale of Goods Ordinance [to section 53(3) of the Sale of Goods Act, 1893, on the measure of damages in such cases]. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. This is set out in section 74 of the Contracts (Malay States) Ordinance which is the same as section 73 of the Indian Contract Act which was held by the Privy Council in *Jamal v. Dawood* (1) to be merely declaratory of the English common law relating to damages.

Cases referred to:—

- (1) *Jamal v. Dawood* 43 I.A. 6.
- (2) *Engell v. Fitch* (1868-9) L.R. 4 Q.B. 659, 669.
- (3) *Rodocanachi v. Milburn* 18 Q.B.D. 67.
- (4) *Williams v. Agius* [1914] A.C. 510.
- (5) *Slater v. Hoyle* [1920] 2 K.B. 11.
- (6) *Heskell v. Continental Express Ltd.* [1950] 1 All E.R. 1033.

COURT OF APPEAL.

K. L. Devaser for the appellants.

Peter Mooney for the respondents.

Thomson C.J.: I have had the advantage of reading the judgment of Hill J.A. I agree with what he says and wish to add a few words only of my own.

On the evidence I do not think there is the slightest room for doubt that what the respondents agreed to sell and what the appellants agreed to buy was shovels the metal portion of which was of and bore the "Spatenmann" brand. What was supplied was shovels the metal portion of which was of another brand and there was thereby a breach of contract.

In the circumstances it was for the purchaser to make his election. He could repudiate the contract, refuse to accept delivery, and sue for damages, or he could accept delivery and sue for damages as for breach of warranty. He elected to follow the second of these courses.

The measure of damages in such a case is normally the difference, if any, between the market value of the goods supplied and the market value of the goods ordered, both values being taken as at the date of delivery. This is not because of anything contained in sub-section (3) of section 53 of the Sale of Goods Act, 1893, for there is no corresponding sub-section in section 59 of our Sale of Goods Ordinance. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. That law is set out in section 74 of the Contracts (Malay States) Ordinance which is the same as section 73 of the Indian Contract Act, which was held by the Privy Council in the case of *Jamal v. Dawood* (1) to be merely declaratory of the English common law relating to damages.

The English rule is thus stated by Kelly C.B. in the case of *Engell v. Fitch*:—(2)

"The measure of damages is the difference between the contract price and the value at the time when the contract was broken."

That case related to a contract for the sale of land. From such cases as *Rodocanachi v. Milburn* (3) and *Williams v. Agius* (4) it is clear that where the contract relates to goods for which there is a market the measure of damages is the difference between the contract price and the market price at the contracted date of delivery. From the case of *Slater v. Hoyle* (5) it is clear that the purchaser is not entitled to compensation for loss of profit from a sub-contract for resale unless the sub-contract was known to the vendor at the time of the original contract, but the facts relating to such a sub-contract may *pro tanto* be looked at as evidence having a bearing on the question of market value (see *Heskell v. Continental Express Ltd.* (6)).

In the present case the subject matter was 100 dozen shovels and the contract price (which was paid) was \$33.54 per dozen. Delivery took place about 28th October, 1959. Regarding the market price there was evidence that in July one of the plaintiffs' customers in Kota Bharu was

prepared to pay \$37.50 a dozen. On 3rd November, 1959, the plaintiffs bought shovels in Singapore and the price they paid was \$41.50, that is about \$8 a dozen over the contract price. The plaintiffs are hardware dealers, their customer in Kota Bharu is a hardware dealer and so is the firm from whom they bought shovels in Singapore. In the absence of any suggestion of collusion it is reasonable to accept that these people know all about the market price of shovels and none of them is likely to have bought or sold such things at a price very different from the market price. On that evidence damages amounting to \$400, that is at the rate of \$4 a dozen, cannot be said to be unjustified by the evidence and indeed for myself I should have thought a considerably higher figure would have been justified.

I would allow the appeal with costs.

Before departing from the case I would, like Hill J.A. express my appreciation of the assistance I have derived from the very careful and well-reasoned judgment of the learned Magistrate.

Hill J.A.: This appeal is about shovels. In June 1959 the respondent contracted to supply the appellant with 100 dozens ballast shovels to be imported from C. Melchers & Co., Bremen, Germany.

The appellant expected to receive shovels with the brand or mark "Spatenmann" stamped on them. Shovels not so branded were supplied and in the result the appellant successfully sued for damages before Mr. Magistrate Chan Siew Yoon in the Kuala Lumpur Magistrate's Court. Judgment was entered in his favour by the learned Magistrate for the sum of \$400 with interest and costs.

From this decision the respondent appealed to the High Court and on the 21st May this year Suffian J. allowed the appeal. This appeal is from the decision of Suffian J.

Two issues are involved in this matter, they are (1) was there a breach of the contract by the respondent and (2) if there was did the appellant suffer any damage arising directly out of the breach.

The contract between the parties is Exhibit P. 1 at page 51 of the record and the following extract from it is sufficient for the purposes of this appeal:—

Singapore, 26th June, 1959.

C. MELCHERS & CO., S.E.A. AGENCY, SINGAPORE, as agents for C. Melchers & Co., Bremen have this day sold to Messrs. Lee Heng & Co., 29 Petaling Street, Kuala Lumpur, the undermentioned goods on terms and conditions as follows:—

Reference:

Goods: Ballast Shovels No. 164a
size 3-335 x 270 mm, square mouth, with pointed and polished socket, with beechwood iron D handle.
Quantity: 100 doz.
Packing: in bundles.
Price: £3. 18. 0 per doz.

A Exhibit P.2 is a catalogue depicting numerous types of "Spatenmann" shovels. According to the plaintiff's evidence (page 17) this catalogue was shown to him and in order to ascertain what precisely is meant by the description of goods in the contract reference must be made to the catalogue. The contract is a little more than a memorandum regarding an order and I think evidence of the catalogue is clearly admissible in view of section 92, Illustration (b) and section 98 of the Evidence Ordinance, No. 11 of 1950. It is clear that what the appellant wanted was the "Spatenmann" shovel No. 164a supplied with a beechwood iron D handle instead of an all beechwood handle as illustrated in the catalogue. It was agreed that such a shovel would be supplied.

The learned Magistrate held that there was a breach of contract and I set out his reasons for this conclusion. They were as follows:—

D "The plaintiff firm made no mistake about what they wanted and the defendant firm knew what the plaintiff firm wanted. But the manager of the defendant firm said that in order to avoid any misunderstanding he had explained the matter in details to the plaintiff firm at the time of the contract as he had done so to the Court. If it was true, then the plaintiff firm had got what they were told they would get and they should not have brought this action. But, was this explanation given? If this explanation had been given, would the plaintiff firm have entered into the contract? I do not think that the plaintiff firm would have done so as it was agreed by both parties that brand was an important factor in this trade and 'Spatenmann' was a popular brand. The conduct of the plaintiff firm after the delivery of the goods and indeed also the conduct of the defendant firm, were consistent with the fact that no such explanation was given. It was not disputed by the defendant that the plaintiff firm had immediately after receipt of the goods notified the local branch that wrong goods had been supplied. This was followed up by correspondence between the defendant firm and the solicitor of the plaintiff firm. The manager of the defendant firm, on the other hand, was prepared to go to the extent of supplying 'Spatenmann' label to the plaintiff firm.

F In my view the position was clearly this: The plaintiff firm wanted shovels of 164a type with beechwood iron D handle. The defendant firm knew this. Either they thought they could supply this but could not (because there were none or the wrong goods were shipped) or they knew they could not supply this, but as they were anxious to carry through a business deal, they hoped that they could persuade the plaintiff firm to accept the goods when they arrived. In my view, there was therefore a breach of the contract and the acceptance of the goods did not affect the plaintiff's right to sue for damages. Section 13(2), Sale of Goods Ordinance, 1957."

H With these findings of fact by the learned Magistrate Suffian J. disagreed for the following reasons:—

I "Nevertheless the learned Magistrate construed the contract by reference to the catalogue, but his decision was not criticised by the defendant on this ground, so I proceed on the assumption that such reference could have been made. What does such reference disclose? The top of the relevant page of the catalogue was inscribed 'Marke Spatenmann' and below it were illustrated five shovels. The illustrated shovel marked '164A' had a handle and on it appeared the brand 'Spatenmann', but below the general description of the shovel it was indicated that there were seven sizes of such shovels but none of the sizes given indicated the brand. In my judgment, this paucity of details did not justify the learned Magistrate in finding as he did, that the specifications in the contract must necessarily refer to shovels bearing the much desired brand. To what shovels then

did they refer? In the circumstances of this case, the onus was on the plaintiff to prove that the wrong goods had been delivered. To succeed, he had to prove, first, what the contract specifications meant and, secondly, that the shovels delivered did not agree with the specifications. As regards the first requirement, he was emphatic that he meant to order 'Spatenmann' shovels but for the rest he was somewhat woolly. First, he said that he had ordered shovels like D.4, then he said that they were different from D.4, as they must have an iron covering near the handle, later he said that they were not even in the catalogue. As against this, the defendant was emphatic that they were like D.5 and as he was the specialist in this make of shovels I do not think that here it could have been held that the plaintiff had discharged the onus of proving what the contract specifications meant. On the contrary I am of the opinion that the learned Magistrate should have accepted the evidence of the specialist. The same in my view applies to the second requirement that the plaintiff had to prove that the wrong shovels had been supplied. He said that shovels like D.3 had been supplied, he still had some of them in his godown and yet he produced none to the Court. On the other hand the defendant was quite certain that shovels like D.5 (the type ordered) had been supplied. In view of this, I do not think that the learned Magistrate should have held that the plaintiff had proved his case that there had been a breach of contract and accordingly I allow this appeal, the plaintiff to pay the costs of this appeal and the costs below."

Suffian J. also stated that:—

"In this case there was no admission nor was there any evidence that the defendant ever showed the plaintiff the catalogues at the time of the contract."

But Lim Mun Fatt, the appellant firm's managing partner definitely stated (p. 17) that

"I ordered some shovels in June 1959. It is known as 'Small Man Brand' catalogue No. 164A.

This is contract I signed (D.2 identified).

This is catalogue (P.2 identified)."

Every page of the catalogue is headed "Marke Spatenmann". There is no suggestion or indication whatever that the shovels illustrated are not all of that make or brand. A brand, moreover, that is apparently popular in Malaya. I feel that the appellant could have come to no other conclusion but that what he was going to get was a Spatenmann brand shovel.

It appears to me too that the respondent was far from being the specialist that Suffian J. considered him to be, and that in fact he was really no better than a salesman anxious to place orders with his principals in Germany. It is not the paper label affixed to the wooden handle of the shovel, which he was prepared to substitute, that is the real indication of its make, but the brand which is stamped on the metal part. This is clear from the shovels exhibited in Court which we examined. I should think the real specialist is the man who imports these shovels for re-sale and the men who actually use them for shifting ballast and so on.

I am of opinion that this was not a case where the Magistrate's findings of fact which led to his conclusion that there had been a breach of the contract should have been reversed. I cannot find that the learned Magistrate misdirected himself on the evidence or that he

A rejected evidence for a wrong reason or that he drew an inference from evidence which was equally capable of supporting a different inference.

And now as regards damages. The appellant had given evidence of a sub-contract and had included in his claim for damages loss suffered under this sub-contract. Very properly, in my view, the learned Magistrate did not take the sub-contract into consideration.

Again I quote from his judgment:

C "If the sub-contract were to be excluded, what then should be the measure of damages. In the consideration of this question one must bear in mind that in this case the plaintiff firm had accepted the goods. This, in my view, was similar to the case where damaged goods instead of sound goods had been delivered to and accepted by the buyer. In the case of *Slater and another v. Hoyle & Smith* [1920] 2 K.B. at page 22, Scrutton L.J. said:

D "Now apply these principles to the delivery of goods not sound but damaged. The only difference appears to be that in the case of non-delivery the buyer has not got the goods and has not paid their contract price; what he has lost is the difference between the market price of the goods and the contract price he would have to pay to get them. If the goods are delivered damaged, he has goods and has paid the contract price; what he has not got is sound goods, and the loss is therefore the difference between the market value of sound goods and the market value of these damaged goods'. Applying this principle as enunciated by Scrutton L.J., I had to find what were the market values of these two brands of shovels at the time of delivery."

F I need not here detail the Magistrate's calculations. The appellant was compelled to purchase shovels in Singapore and the learned Magistrate concluded his judgment by stating:

G "I was therefore convinced that the plaintiff firm in fact paid \$4.150 for the shovels which they obtained in Singapore. The market value of the goods actually supplied was \$3,750 for 100 dozens and the market value of the goods which were originally ordered was \$4,150. The difference in value was \$400 for 100 dozens. I therefore entered judgment for plaintiff for the sum of \$400 with interest on the judgment sum and cost."

This is a figure at which I arrived at independently myself and I agree with the Magistrate's award.

H I would therefore allow this appeal with costs here and in the Courts below.

I would like to state that the judgment of Mr. Magistrate Chan Siew Yoon is one of the best of its kind that I have read from the summary Courts.

I Good J.A.: I have had the benefit of reading the judgment of Hill J.A. with which I agree and have nothing to add.

Appeal allowed.

Solicitors: K. L. Devaser & Co., Bannan & Bailey.